

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.M., Appellant**

**and**

**U.S. POSTAL SERVICE, DISTRIBUTION  
CENTER, Melville, NY, Employer**

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**Docket No. 06-661  
Issued: April 25, 2007**

*Appearances:*  
*Paul Kalker, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 27, 2006 appellant filed a timely appeal from a December 8, 2005 decision of the Office of Workers' Compensation Programs which terminated her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits on March 21, 2004 on the grounds that her accepted conditions had resolved.<sup>1</sup>

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<sup>1</sup> In an August 25, 2005 decision, the Office approved an attorney's fee. Appellant did not seek review of this decision before the Board.

## **FACTUAL HISTORY**

On October 19, 2000 appellant, then a 39-year-old general expediter clerk, filed a traumatic injury claim alleging that on October 18, 2000 she sustained injury to her right arm and wrist when she was struck by a garbage bin. She stopped work that day and did not return. Appellant's claim was accepted by the Office for contusions of the right arm and wrist and she received appropriate compensation for total disability.

Appellant was treated by Dr. Peter Stein, a Board-certified orthopedic surgeon, who advised that she remained disabled for work due to her complaint of pain. The record reflects that an investigation was conducted by the employing establishment and, by memorandum dated January 21, 2003, a postal inspector advised that appellant was under limited surveillance during the period May 21 to December 5, 2002. It was reported that appellant was active and able to lift, grasp, drive a vehicle, push, pull and perform repetitive motions with her right hand. She was observed weeding her yard for over an hour, lifting a wheelchair from her van, carrying grocery bags, utilizing pruning sheers, a pool skimmer pole and dog scooper without apparent difficulty. The postal inspector documented each surveillance session and provided videotapes.

On March 8, 2003 the Office referred appellant to Dr. Richard Goodman, a Board-certified orthopedic surgeon, for a second opinion examination. In an April 4, 2003 report, Dr. Goodman stated that he examined appellant on March 31, 2004. He reviewed appellant's history of injury and the medical evidence of record. Dr. Goodman noted that on July 2, 2002 Dr. Stein mentioned appellant's complaint of unremitting right forearm pain of unknown etiology. Examination of the right upper extremity revealed a full range of elbow motion with symmetrical reflexes and normal motor power. Dr. Goodman stated that examination revealed no objective findings and he stated that appellant's accepted contusions resolved approximately one week following the October 18, 2000 event. He concluded that appellant had no remaining disability due to her accepted conditions and advised that there were no medical restrictions for her return to full-time duty as an expediter clerk.

In a May 20, 2003 report, Dr. Stein reported that appellant exhibited tenderness throughout the right hand and wrist. He provided a work capacity evaluation, noting that appellant's ability to work as limited by her pain. Dr. Stein indicated that she could work for four hours intermittently, subject to specified limitations on use of her right upper extremity.

The Office determined that a conflict in medical opinion arose between the opinions of Dr. Stein and Dr. Goodman regarding whether appellant's accepted conditions had resolved and the nature and extent of her continuing disability for work. On November 20, 2003 it referred her to Dr. Richard Ritter, a Board-certified orthopedic surgeon, selected as the impartial medical referee.

In a December 18, 2003 report, Dr. Ritter reviewed appellant's history of injury and medical treatment. He noted that on October 18, 2000 appellant was struck by a janitor's garbage bin on her right forearm. She stopped work due to complaints of pain, numbness and tingling. Dr. Ritter reviewed appellant's medical treatment, noting that surgery was never recommended. Physical therapy was attempted, but appellant believed that it only aggravated her forearm condition. Dr. Ritter stated that he reviewed appellant's diagnostic test results, her

job description and a memorandum dated January 21, 2003 with still pictures and an attached videotape of periodic surveillance conducted in 2002. On physical examination, appellant was in no acute distress. Both arms and forearms were found normal in appearance without gross deformities and no temperature differences. An excellent symmetric range of motion was found in both shoulders in all planes of motion with full active and passive motion of both elbows and full range of motion of both wrists. Reflexes were reported as normal with good grip strength demonstrated, although she complained of discomfort during strength testing. Appellant also complained of nonspecific tenderness which Dr. Ritter could not localize in the right forearm. On measurement, he found no disuse atrophy of the right forearm; rather it was one centimeter larger when compared with her left side. Finkelstein and Tinel's testing was negative bilaterally with sensation intact in all distributions. The 1999 x-rays presented were found to be normal as were the November 1998 electrodiagnostic studies.

Dr. Ritter discussed a review of Dr. Stein's medical narrative reports, noting her history of an initial ganglion cyst in 1994 and complaint of numbness in 1998 when pulling a chain. Diagnostic studies were normal without any evidence of abnormal nerve function. Although she presented to Dr. Stein on numerous occasions, no specific treatment was recommended and he did not report significant objective findings. Dr. Ritter stated his agreement with Dr. Stein's July 25, 2001 opinion that appellant's forearm contusions had completely resolved and that her continuing complaints were of an unknown etiology.

Dr. Ritter also reviewed the surveillance videotape. While parts were blurry, he noted that the majority of the tape was clear and that appellant seemed to be using her right hand without any difficulty during a multitude of activities including, but not limited to driving long distances, pulling, pushing and lifting various objects. Appellant was also observed weeding her garden for an extended period of time, using tools in her right hand without any obvious difficulty. Dr. Ritter found that appellant could perform the majority of her duties as a postal clerk expediter. He reiterated that there were no objective findings of the accepted contusions of the right arm, synovitis, tenosynovitis or right wrist sprain. In light of the videotape, Dr. Ritter noted it was difficult to believe appellant's assertions that she was unable to perform any repetitive activity. He noted that she demonstrated a good range of motion and good muscle strength. Dr. Ritter advised that appellant did not require any further orthopedic treatment, noting her complaints were of a vague nature and not supported by any demonstrated atrophy of the forearm which would be expected in a chronic condition such as she claimed. He concluded that she could return to work without restriction.

On December 5, 2003 appellant requested copies of the surveillance pictures and videotape, as reviewed by Dr. Ritter.

On January 20, 2004 the Office issued a notice of proposed termination of compensation. It noted that the report of Dr. Ritter represented the weight of medical opinion.

By letter dated February 19, 2004, appellant's representative contended that she remained disabled due to her accepted injury. It was contended that neither Dr. Goodman nor Dr. Ritter stated any rationale for their conclusions and their reports were insufficient to support the proposed termination.

By decision dated February 24, 2004, the Office finalized the termination of appellant's compensation benefits effective March 21, 2004.

On October 23, 2004 reconsideration was requested on behalf of appellant. Counsel contended that the Office failed to formulate a suitable job offer given appellant's disabled condition and that the Office failed to acknowledge counsel's February 19, 2004 letter in opposition to the termination. He argued that the medical evidence unequivocally demonstrated that appellant remained disabled due to her accepted conditions and that Dr. Ritter did not provide rationale for his stated conclusions. Counsel also argued that the Office violated appellant's due process rights by relying on the surveillance evidence provided by the postal inspectors without providing her the opportunity to review such evidence.

On January 5, 2005 the Office affirmed the termination decision. It found that the medical evidence from Dr. Ritter was sufficient to establish that appellant's work-related disability had ceased and that Dr. Stein had opined that she could return to her regular occupation prior to the termination decision. While it was clear the videotape was not provided to appellant, as requested, the February 24, 2004 decision properly considered the weight of medical opinion. Because appellant was not previously provided with the surveillance videotape, the February 24, 2004 decision was vacated and reissued with the effective date of January 5, 2005. A copy of the videotape was provided to appellant on that date.

On March 15, 2005 appellant filed an appeal with the Board. In a September 6, 2005 order, the case was remanded to the Office for reconstruction as the case record was not received in a timely manner.<sup>2</sup>

On December 8, 2005 the Office reissued the February 23, 2004 decision, noting that no additional medical evidence was received subsequent to the January 5, 2005 decision.

### **LEGAL PRECEDENT**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup> The burden of proof on the Office includes the necessity of furnishing rationalized medical opinion evidence which is based on a proper factual and medical history.<sup>4</sup>

Section 8123(a) of the Federal Employees' Compensation Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>5</sup> When the case is referred to an impartial medical specialist for the purpose of

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<sup>2</sup> Docket No. 05-1014 (issued September 6, 2005).

<sup>3</sup> *David W. Pickett*, 54 ECAB 272 (2002); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>4</sup> *Daniel F. O'Donnell*, 54 ECAB 456 (2003); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>5</sup> 5 U.S.C. § 8123(a). See *Elsie L. Price*, 54 ECAB 734 (2003); *Raymond J. Brown*, 52 ECAB 192 (2001).

resolving a conflict in medical evidence, the opinion of such specialist will be given special weight when based on a proper factual and medical background and sufficiently well rationalized on the issue presented.<sup>6</sup>

### ANALYSIS

Appellant sustained injury to her right forearm on October 18, 2000, accepted by the Office for contusions of the right arm and wrist. She was treated by Dr. Stein, who opined that she had residual disability due to her accepted injury consisting of tenderness throughout the right hand and wrist. Dr. Stein provided work restrictions, noting she could work intermittently for four hours a day. He also noted that appellant's pain was of an unknown etiology. Appellant was referred for examination by Dr. Goodman, who opined that there were no objective findings to support continuing residuals or disability due to the accepted injury. He advised that appellant's accepted contusions had resolved and that she had no medical restrictions. Based on this evidence, the Office properly determined that a conflict in medical opinion arose between appellant's attending physician and the second opinion referral specialist.

Appellant was referred to Dr. Ritter, selected as the impartial medical specialist to resolve the conflict in medical opinion. In a December 18, 2003 report, the physician provided a comprehensive review of the October 18, 2000 injury, appellant's preexisting condition and medical treatment. On physical examination, he reported normal range of motion of both shoulders, elbows, wrists and hands. Reflexes were reported as normal with good grip strength. Dr. Ritter noted that he could not localize appellant's complaint of discomfort in the right forearm. Of note, he found no atrophy of the right upper extremity, which would be expected in a chronic condition such as appellant claimed. Dr. Ritter examined diagnostic tests obtained of the right upper extremity and noted that x-rays presented were normal as where electrodiagnostic studies. He questioned whether a conflict in medical opinion remained, citing to the July 25, 2001 report of Dr. Stein who opined that appellant's contusions had resolved and that her complaints were of an unknown etiology. Dr. Ritter also reviewed the surveillance videotape, commenting that appellant was observed using her right hand without apparent difficulty during multitude of activities. He reiterated that there were no objective findings based on his examination and stated that it was difficult to believe her assertions that she was unable to perform any repetitive activity. Dr. Ritter concluded that appellant's accepted conditions had resolved and that she could return to work as a postal clerk expediter without any work restrictions.

When a case is referred to an impartial medical specialist to resolve a conflict in medical evidence, the opinion of such specialist will be given special weight by the Board when based on an accurate factual and medical history and with a well-rationalized explanation for the conclusions reached. The Board finds that the weight of medical evidence is represented by the report of Dr. Ritter. He provided a very thorough review of the factual and medical evidence, detailed his findings on physical examination of appellant, discussed the diagnostic tests obtained and provided discussion for the conclusions he reached. His report establishes that appellant's accepted contusions have resolved and that she has no further disability or residuals

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<sup>6</sup> See *Bernadine P. Taylor*, 54 ECAB 342 (2003); *Anna M. Delaney*, 53 ECAB 384 (2002).

due to her accepted injury. Dr. Ritter explained that she could return to her regular work as a postal clerk expediter without any medical restrictions. Counsel's argument that appellant remains disabled due to her October 18, 2000 injury is not supported by the report of Dr. Ritter. The impartial medical specialist provided a well-rationalized medical report addressing the issues of appellant's residuals and disability for work.

Counsel contends that the Office violated federal regulations and appellant's procedural rights by relying on the surveillance report and videotape evidence presented by the postal inspectors without first providing her with the opportunity to review such evidence. The Office acknowledged that these materials were not presented to appellant until January 5, 2005.

Counsel did not cite to any Board case authority or federal regulation to support his argument that the Office violated workers' compensation procedures by its delay in providing the surveillance materials to appellant. In *Ronald H. Browning*,<sup>7</sup> the employee responded to the Office's proposal to terminate his compensation benefits stating that he had not seen a surveillance videotape. His attending physician had reviewed the film and the report of a second opinion specialist and found the employee could return to his job as a letter carrier. The Board affirmed the termination. It was noted that the employee did not submit any medical evidence to refute the report of his attending physician or the second opinion specialist. A medical report from a new physician was found to be of reduced probative value in that he did not review the surveillance tapes or comment on the medical reports of record. The fact that the employee did not see the videotape before referral to the physicians was found not to be a procedural error.

In *Jeffrey D. Barnett*,<sup>8</sup> the employee objected to the termination of his compensation benefits. He contended at oral argument that the medical evidence was unreliable as a surveillance videotape misrepresented his physical condition. The Board noted that his then treating physicians had viewed the film and found that he could return to work without restriction. It was noted that the employee did not raise any concern about the accuracy of the videotape with either physician and continued under treatment with one of the doctors. The allegation that the videotape improperly influenced the opinions of his treating physicians was unsubstantiated.

In *George Zupko*,<sup>9</sup> the Board affirmed the termination of the employee's compensation benefits based on his refusal of suitable work. On appeal, counsel for the employee contended that the medical reports were based on erroneous information because they relied on the surveillance videotape. The Board found that the medical reports from the employee's attending neurologist and a second opinion orthopedic surgeon were not based on an erroneous factual background. Both physicians were found to have supported their opinion that the employee was capable of performing limited duty based on objective evidence from examination.

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<sup>7</sup> Docket No. 98-1425 (issued December 22, 1999).

<sup>8</sup> Docket No. 00-27 (issued February 15, 2001).

<sup>9</sup> Docket No. 00-1107 (issued December 14, 2001).

In *Kathleen McKinnon*,<sup>10</sup> the employee's accepted cervical and thoracic strains were found to have resolved. At a hearing, appellant stated that she had not seen a surveillance videotape. She acknowledged that she could perform certain daily activities but that they differed markedly from her duties as a letter carrier. The Board affirmed the termination of compensation, finding the weight of opinion represented by the report of an impartial medical specialist. The fact the employee did not see the videotape prior to referral to the examining physicians was found not to constitute a procedural error.

In *Oscar Anderson*,<sup>11</sup> the Board reversed an Office decision terminating the employee's compensation benefits. The Board found that the impartial medical specialist did not provide sufficient rationale explaining why residuals of the employee's cervical condition had ceased. In a footnote, the Board addressed counsel's argument that it was inappropriate to allow the impartial medical specialist to review an edited surveillance tape. The Board cited to numerous cases in which it had allowed physicians to review videotapes in evaluating a claimant's actual physical abilities. The Board noted that the employee submitted evidence that the videotape improperly represented his activities.

In *Frederick Nightingale*,<sup>12</sup> the Board addressed deficiencies in the written report of an investigator which reduced the probative value of the evidence presented therein. The Board commented, as follows:

“[A]ppellant should have been apprised of the conflicts and inconsistencies, and of the general nature of the adverse evidence developed, in order that he might know the nature of the issues to be met and have an opportunity to present such rebuttal or explanation as was available. This in the Board's view is vital in the nonadversary proceedings under the Federal Employees' Compensation Act, as it is the function of the [Office] to adjudicate the rights of claimants in the light of all the relevant facts, facts which can only be developed fully when the claimant is fairly advised as to the nature of evidence from other sources which bears on his claim.

“The Board is aware of the informal processes employed in the administrative development of cases, and the techniques of investigation, which sometimes lead to records replete with hearsay evidence, and of the [Office's] responsibility to evaluate such evidence in the light of all the surrounding facts and circumstances of the particular case. For these reasons technical objections regarding the nature of the evidence are seldom of great moment, but there are limits beyond which the process cannot extend without serious prejudice to the right of the individual claimant or to the interests of the United States.”<sup>13</sup> (Citations omitted.)

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<sup>10</sup> Docket No. 00-2797 (issued April 26, 2002).

<sup>11</sup> Docket No. 02-235 (issued October 10, 2002).

<sup>12</sup> 6 ECAB 268 (1953).

<sup>13</sup> *Id.* at 271.

Under certain circumstances, videotape evidence may be of value to a physician offering an opinion regarding a claimant's medical condition. It may reflect on the patient's reliability as a historian or on the actual ranges of motion, lifting or other physical activities the claimant may perform. However, a videotape may be incorrect or misleading to a physician if there are errors, such as the identity of the individual recorded on the videotape or whether certain activities were facilitated by the use of medication. The Office has the responsibility to make the claimant aware that it is providing videotape evidence to a medical expert. If the claimant requests a copy of the videotape, one should be made available and the employee given a reasonable opportunity to offer any comment or explanation regarding the accuracy of the recording.

In this case, appellant did not present any evidence following receipt of the videotape on January 5, 2005 to question its accuracy. There is no argument that the individual recorded was not appellant or any contention that the activities in which she was engaged were facilitated by the use of any medications. Moreover, the opinion of Dr. Ritter is clearly based on more than a review of the videotape. His medical report, as noted, provided a thorough evaluation of appellant's factual and medical background and findings on physical examination. Dr. Ritter addressed the reports of the treating and second opinion physicians and reviewed the diagnostic tests conducted. He merely noted that the videotape reduced the credibility of her continuing complaints in light of the absence of any objective findings. The Office's delay in submitting the surveillance materials and videotape to appellant did not prejudice her rights in this case. The Office met its burden of proof to terminate her compensation benefits.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective March 21, 2004.



**ORDER**

**IT IS HEREBY ORDERED THAT** the December 8, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 25, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board